

Decision 06-04-069 April 27, 2006

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Joint Application of Hypercube, LLC and KMC Data LLC (U-6592-C) for Grant of Authority to Complete a Series of Transactions Resulting in the Transfer of Control of KMC Data LLC.

Application 05-12-027
(Filed December 23, 2005)

DECISION GRANTING APPLICATION

I. Summary

In this decision, we grant the joint application of Hypercube, LLC (Hypercube) and KMC Data LLC (KMC Data) to transfer control of KMC Data to Hypercube. (Hypercube and KMC Data are sometimes collectively referred to hereafter as Applicants.)

II. Background

KMC Data is a limited liability company formed under the laws of the State of Delaware and headquartered in Bedminster, New Jersey. It is an indirect, wholly-owned subsidiary of KMC Telecom Holdings, Inc. (KMC Holdings), which is in turn owned by a diverse group of investors. KMC Holdings controls a family of companies in addition to KMC Data that provide regulated telecommunications services in various states as well as interstate and international services. KMC Data's principal business is the provision of tandem services to wireless carriers, interexchange carriers, competitive local exchange carriers (CLECs) and incumbent local exchange carriers (ILECs). Historically,

ILECs have been the default provider of choice for interconnection with other carriers. KMC Data provides a competitive alternative to ILEC tandem services.

Hypercube is a newly-formed Delaware limited liability company created for the purpose of acquiring KMC Data. Following the transaction, KMC Data will continue to provide tandem services to its customers. Most of the outstanding shares of Hypercube are owned by entities that separately hold direct minority interests in KMC Holdings and consequently hold indirect interests in KMC Data. Hypercube therefore shares continuity of ownership with KMC Data.

Hypercube is overseen by the same senior management team that currently oversees KMC Data's operations, including its CEO, CFO, CTO and Vice-President Government Affairs. Consequently, this transaction is virtually *pro forma* because there will be both continuity of ownership and continuity of management.

Applicants have supplied financial information that demonstrates that the proposed transaction will not adversely affect the financial viability of KMC Data. Applicants project that no further capital infusion will be necessary.

Applicants have agreed to complete a series of agreements whereby KMC Data will become a wholly-owned subsidiary of Hypercube. The change in ownership will be structured as a direct acquisition by Hypercube of all outstanding ownership interests in KMC Data. Pursuant to an Asset Purchase Agreement dated as of November 15, 2005, Hypercube will acquire all the outstanding ownership interests in KMC Data in exchange for a \$1.6 million subordinated promissory note and the assumption of certain liabilities of the KMC Companies including KMC Data. Following the transaction, KMC Data

will continue to provide tandem services to its customers as a subsidiary of Hypercube.

III. Discussion

Public Utilities Code Section 854 requires Commission authorization before a company may "merge, acquire, or control...any public utility organized and doing business in this state...." The purpose of this section is to enable the Commission, before any transfer of public utility property is consummated, to review the situation and to take such action, as a condition of the transfer, as the public interest may require. (*San Jose Water Co.* (1916) 10 CRC 56.)

The proposed transaction is not adverse to the public interest. After the transaction, KMC Data will carry on the same business with the same management as before in a manner that will be transparent to its customers. As a stand-alone company with a profitable line of business, KMC Data is in a position to ensure that customers will continue to receive services on an uninterrupted basis, under the same rates, terms and conditions as they are currently provided.

The application is granted, subject to the terms and conditions set forth below.

IV. Filing of Reports and Payment of Fees

The Commission's Telecommunications Division has not received a 2005 user fee report, any public program surcharge reports from 2004 onward or any payment of required fees from KMC Data. Accordingly, approval of this application will be contingent upon KMC Data filing the required reports and paying any fees due.

V. Categorization and Need for Hearings

In Resolution ALJ 176-3165, dated January 12, 2006, the Commission preliminarily categorized this proceeding as ratesetting and preliminarily determined that hearings were not necessary. Based on the record, we conclude that it is not necessary to alter the preliminary determinations in Resolution ALJ 176-3165.

VI. Comments on Draft Decision

This is an uncontested matter in which the decision grants the relief requested. Accordingly, pursuant to Public Utilities Code Section 311(g)(2), the otherwise applicable 30-day period for public review and comment is being waived.

VII. Assignment of Proceeding

John A. Bohn is the Assigned Commissioner and Karl J. Bemederfer is the assigned Administrative Law Judge in this proceeding.

Findings of Fact

1. Notice of this application appeared in the Commission's Daily Calendar of December 28, 2005.
2. Applicants seek approval pursuant to Public Utilities Code Section 854 of an internal reorganization that will result in a change of control of KMC Data.
3. KMC Data (U-6592-C) is a certificated competitive local exchange carrier and interexchange carrier subject to the jurisdiction of this Commission.
4. There will be no change in the management structure or operations of KMC Data as a result of its acquisition by Hypercube.
5. Hypercube has satisfied the financial and experience requirements we impose on applicants for a Certificate of Public Convenience and Necessity.

6. Applicant has not filed its 2005 user fee report nor has it filed any public program surcharge report from 2004 forward.

Conclusions of Law

1. The proposed change of ownership structure is not adverse to the public interest.

2. This proceeding is designated a ratesetting proceeding; no protests having been received, no hearing is necessary.

3. The application should be approved.

O R D E R

IT IS ORDERED that:

1. KMC Data LLC (KMC Data) and its Hypercube, LLC (Hypercube) are authorized pursuant to Section 854 of the Public Utilities Code to enter into a transaction whereby KMC Data will become a wholly-owned subsidiary of Hypercube.

2. Within sixty (60) days of the date hereof, KMC Data shall file its 2005 user fee report and its public program surcharge reports from 2004 forward and pay any required fees. The filings shall provide sufficient detail of its revenues to enable the Commission's Telecommunications Division to confirm that the proper fees have been paid. Hypercube shall not be permitted to acquire control of KMC Data until Telecommunications Division has confirmed that the required fees have been paid. Should Applicant fail to file the required reports and pay the required fees within the 60-day period specified in this order, Telecommunications Division is ordered to revoke Applicant's existing Certificate of Public Convenience and Necessity.

3. Telecommunications Division shall review the filing required by Ordering Paragraph 2 to confirm that KMC Data has paid the proper fees. Upon confirmation, Telecommunications Division shall notify Administrative Law Judge Bemmesderfer in writing that the fees have been paid and shall send a copy of its notice to Applicants. Upon receipt of such confirmation, Applicants may complete the transfer of control.

4. The authority granted herein shall expire if not exercised within one year of the date of this order.

5. Application 05-12-027 is closed.

This order is effective today.

Dated April 27, 2006, at San Francisco, California.

MICHAEL R. PEEVEY
President
GEOFFREY F. BROWN
DIAN M. GRUENEICH
JOHN A. BOHN
RACHELLE B. CHONG
Commissioners